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No. 67

In the Supreme Court of the United States

OCTOBER TERM, 1964

STATE OF LOUISIANA:
JIMMIE H. DAVIS, C. C. AYCOCK, J. THOMAS JEWELL, AS MEMBERS OF THE BOARD OF REGISTRATION OF THE STATE OF LOUISIANA, AND HUGH E. CUTRER, JR., DIRECTOR AND EX OFFICIO SECRETARY OF THE BOARD OF REGISTRATION OF THE STATE OF LOUISIANA,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLANTS

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STATEMENT OF THE CASE

Appellants, State of Louisiana: Jimmie H. Davis, C. C. Aycock, J. Thomas Jewell, as Members of the Board of Registration of the State of Louisiana, and Hugh E. Cutrer, Jr., Director and Ex Officio Secretary of the Board of Registration of the State of Louisiana, appeal from the order of the United States District Court for the Eastern District of Louisiana, entered February 4, 1964, declaring a portion of Article 8, Section 1 (d), as amended in 1960, of the Constitution of Louisiana to be invalid and unconstitutional, and issuing a permanent injunction against its use in Louisiana.

The decree further enjoined the use of a new objective, standard and written "citizenship test" (Art. 8, Sec. 18, La. Constitution) in twenty-one named parishes of the State of Louisiana as to persons of voting age who had the requisite residence in the parish before August 3, 1962 until there had been a general re-registration of all voters in the named twenty-one parishes, or until it has been shown that the interpretation test has lost its discriminatory effect in the parish.

The opinion of the United States District Court for the Eastern District of Louisiana decreeing the constitutional requirement that an applicant for voting registration be able to understand and give a reasonable interpretation of any section of the State or Federal Constitution invalid and enjoining its use was rendered on November 27, 1963 and is reported at 225 F. Supp. 355. The dissenting opinion of District Judge West is reported at 225 F. Supp. 398.

This suit was initiated in the United States District Court for the Eastern District of Louisiana to declare invalid a portion of Article 8, Section 1 of the Louisiana Constitution. It was brought pursuant to 42 U.S.C.A. 1971, 20 U.S.C.A. 2201, 42 U.S.C.A. 1971 (d) and 28 U.S.C.A. 1345, and was heard by a three-Judge Court convened under 28 U.S.C.A. 2281 and 2284.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article 8, Section 1(c) of the Constitution of

Louisiana and Louisiana Revised Statute 18:35 provide as follows:

> "(c) Character and Literacy
> . . . Said applicant shall be able to read any clause in this Constitution or the Constitution of the United States and give a reasonable interpretation thereof."
>
> "§ 35. Ability to read and interpret constitution
> Applicants for registration shall also be able to read any clause in the Constitution of Louisiana or of the United States and give a reasonable interpretation thereof."

The United States brought this action against the State of Louisiana and the members of the Board of Registration. It was instituted pursuant to the provisions of 42 U.S.C.A. 1971 as amended, and pursuant to 28 U.S.C.A. 2201 (Declaratory Judgments). Defendants filed a motion to dismiss upon the contention that the complaint failed to raise a substantial constitutional question and failed to state a justiciable controversy within the jurisdiction of the three-Judge Court. This Motion was overruled and the cause was heard before the three-Judge Court. In overruling said motion the Court supported its jurisdiction under 42 U.S.C.A. 1971, 28 U.S.C.A. 1345 and 28 U.S.C.A. 2281. The defendants' motion to dismiss alleged the Court had no jurisdiction to claim the relief prayed for under the Federal Declaratory Judgments Act, 28 U.S.C.A. 2201, but this contention was overruled.

On January 28, 1964 the District Court signed, and on February 4, 1964 entered, a final order declar-

ing the invalidity of the understanding and interpretation test, and an injunction restraining its enforcement, and also an order restraining twenty-one named parishes from enforcing as against future applicants for registration the citizenship test in the absence of a complete re-registration of all voters or some other action which would fully correct the so-called discriminatory effects of the interpretation test.

Judge West wrote a dissenting opinion on December 31, 1963. Notice of appeal was filed in the District Court on March 5, 1964.

ARGUMENT

I.

The motion to dismiss should have been sustained. See *U. S. v. Mississippi*, 229 F. Supp. 925 (1964). In that case the State of Mississippi contended that Section 601(b) of the Civil Rights Act was unconstitutional as applied to it. Its position is that the Fifteenth Amendment forms the only basis for 42 U.S.C.A. 1971[1] and that this Amendment is directed to persons through whom a State may act and not to the sovereign entity of the State itself.

The State of Mississippi also contended that all legislation by which Congress may choose to implement the Fourteenth Amendment is subject to the same objection and supports these contentions by citation of numerous authorities.[2]

In thoroughly discussing the subject of the constitutionality of Section 601 (b), Circuit Judge Cam-

[1] *U.S. v. Raines*, 362 U.S. 17, 80 S.Ct. 519, 4 L. Ed. 2d 524.
[2] *U.S. v. Mississippi, supra*, Page 934.

eron's conclusion and opinion apply in most minute detail to the very situation in which we find ourselves in this case. He quotes profusely from *Ex Parte Virginia* 100 U.S. 339 and *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed 714, and even though these cases principally relate to incidents in which the Eleventh Amendment were involved as a bar to the action brought, the State of Louisiana contends that it does not rely on the Eleventh Amendment. It rather asserts that the legal reasoning which allows individuals to pursue alleged violations of Fourteenth and Fifteenth Amendment rights caused by "State action", despite the provisions of the Eleventh Amendment, is equally applicable to demonstrate the non-liability of the State in the present suit.

Judge Cameron goes on to say:

> "In the latest and only comment on the subject, the Supreme Court of the United States expressly pretermitted any decision on the constitutionality of Section 601(b) in its per curiam opinion in *United States v. Alabama*, 362 U.S. 602, 80 S.Ct. 924, 4 L.Ed. 2d. The Court of Appeals for the Fifth Circuit has taken the same attitude in a direct comment on the same question in *United States v. Atkins*, 323 F.2d 733, in which the Court stated:
>
> > 'In that case *(United States v. Alabama)*, the Supreme Court intimated no views upon "any defenses, constitutional or otherwise, that may be asserted by the State." We follow the same course in the present case.'

Obviously these tribunals consider the question still an open and undecided one."

This same principle applies to this case and for purposes of asserting this right we adopt as argument all of the reasons for these conclusions given by Circuit Judge Cameron in his opinion.

In the Alabama case it is clear that the amendment to the Civil Rights Act, 42 U.S.C.A. 1971(c), authorizing actions such as this to be brought against the State was passed for a particular purpose, i.e., to fill a vacuum caused by the fact that there were no registrars having jurisdiction over Macon County, Alabama. Under several principles of constitutional law this departure from traditional constitutional principles would be held to apply only to the circumstances and conditions which lay behind the Court's holding. There is no such situation here. The registrars are all available and full relief can be had against them and a dismissal of the State from the controversy would in no wise prejudice the granting of the relief sought. In this case the registrar of voters were not even made defendants. We contend that they were indispensable parties and so argued in our motion to dismiss. Besides the State only the Board of Registration has been made a defendant and the only complaint made against the Board is that it has corrected by its resolution of October, 1961 the discriminatory application of the interpretation test alleged in Paragraph 21 of plaintiff's complaint.[3]

[3]This resolution duly promulgated advised and required all registrars of voters in the State of Louisiana to enforce strictly and without discrimination all of the requirements for registration including the interpretation test.

II.

The State Board of Registration is created by Article 8, Section 18 of the Constitution of Louisiana. Its powers and duties, are set forth therein as follows:

> "The Governor, Lieutenant Governor and Speaker of the House of Representatives shall compose the Board of Registration and any two members of same shall have power to remove at will any registrar in this state."

The powers and duties of said Board of Registration were provided for in LSA:R.S. 18:191.[4] As can

[4] §191. Rules and regulations; board of registration; director and ex-officio secretary

A. Except as otherwise specifically provided in this Chapter, the board of registration shall from time to time prescribe by rules and regulations duly promulgated the method of the administration of this Chapter, and shall prescribe and direct the registrars of voters to propound an objective test of citizenship under a republican form of government, which said objective test shall be provided for, prepared and furnished to the registrars by the board of registration, and the character and forms of record, affidavits and other documents necessary or proper, in its opinion, to carry into effect the provisions of this Chapter, and shall file them in the office of the secretary of state.

B. The office of director of registration is created. The director shall be a qualified elector, over thirty years of age. He shall be appointed by the board of registration and shall serve at the pleasure of the board. His duties shall be to administer the rules and regulations of the board of registration and he shall perform such other duties in connection with the powers of the board of registration and the promotion of registration of the voters of the State as may be directed by it. His salary shall be sixty-six hundred dollars per annum. He shall ex-officio be secretary of the board of registration.

C. The registrars of voters shall forward to the director of registration copies of all reports made by them to the Secretary of State.

D. The legislature shall appropriate sufficient moneys for the salary of the director and the expenses of the offices of the director and the board of registration.

E. Service of the director as a registrar of voters shall be deemed creditable service in the application to him of any provision of the State Employees Retirement System, R.S. 42:541 through 42:672.

be seen the duties of this Board are particularly described by the statute and are only to prescribe by general rules and regulations the method of the *administration* of this chapter and prescribe the *character and forms of affidavits* and other documents necessary and proper in its opinion to carry into effect the provisions of this Chapter. This Board had no authority in any way to enforce any of the statutes or practices under attack. By amendments to Article 8, Section 18 of the Constitution and particularly Act 539 of 1962 adopted November 6, 1962, the duties and obligations of said Board of Registration were expanded to include the following:

> "The Board shall from time to time adopt such rules and regulations as it finds necessary for proper functioning of registration procedure in the State and shall prepare, adopt and issue a uniform, objective written test or examination for citizenship to determine that applicants for registration understand the duties and obligations of citizenship under a Republican form of government. The Board of Registration shall direct and instruct the registrars to administer this test to all applicants for registration and the results shall be maintained in the registrar's office as public records so that all persons shall have access to them and the right to appeal therefrom under the applicable laws relating thereto as provided elsewhere in this Constitution."

Implementation of this constitutional provision was provided for by Act 62 of the Legislature of 1962, the contents of which are identical to those above

quoted. No choice is given to the Board of Registration in the selection of the parish registrars. The statutes make it plain that this Board are mere conduits through which a minor part of the registration processes flow, Prior to the Constitutional Amendment of 1962 the Board's supervision of the registration process was, in fact, limited to the furnishing of supplies and assisting the registrars with individual administrative problems as they might occur. There is no controversy between appellee and the Board of Registration. When said Board by its resolution of October 1961 suggested that the interpretation test be strictly applied its purpose was to have the registrars follow the State law which at least at that time was a valid existing exercise of State authority. The Act in itself was one designed (a) to eliminate laxity and non-compliance on the part of the individual registrars and (b) to institute an indiscriminate application of the State law as it was intended to be used.

We cannot visualize how an injunction could issue against the Board of Registration or any of its members individually for they are not charged with enforcing or threatening to enforce any of the statutes under attack. In fact by the very terms of the statutory law the registrars are required to comply with and apply all laws of the State relative to the registration of voters faithfully and without reservation of conscience or mind. LSA:R.S. 18:12.

Thus the effect of the decision in *United States v. Louisiana* is to declare invalid Louisiana's consti-

tutional interpretation test, LSA-Constitution of 1921, Article VIII, Section 1(d) and LSA:R.S. 18:35 as used to determine voter qualifications and holds further that the vices cannot be cured by enjoining its unfair application. The further result is that Registrars of Voters in twenty-one specific parishes are enjoined from using a perfectly valid test as a State qualification for voting even though the majority opinion itself states "we reserve judgment therefore on the constitutionality of the new examination . . ." We know of no authority whereby this Court can issue a prohibitory order against ministerial officers performing a valid legal ministerial function in an indiscriminate manner when these persons are not even parties involved in the controversy and when the plaintiffs have no right to the relief sought against those who have been made defendants in the proceedings.

> "Three Judge courts constitute a unique burden on the Federal Judiciary. To keep this burden to a minimum, the statutes vesting the right to call such courts to sit in judgment of constitutional challenges are to be strictly construed as a procedural technicality and not as a broad remedial social policy. See *Phillips v. U. S.* 312 U.S. 246, 61 S. Ct. 480, 85 L. Ed 800; *Stainback v. Mo Hock Ke Lok Po* 336 U.S. 368, 69 S.Ct. 606, 93 L. Ed 741; and *Kesler v. Dept. of Public Safety* 369 U.S. 153, 82 S.Ct. 807, 7 L. Ed 2d 641."

> "Where, as here, parties are brought before such a tribunal who are not at all within the con-

templation of the statutes attacked and who are not indispensable, necessary or proper parties to the determination of the issues in controversy, they should be dismissed in the interest of sound judicial administration as well as to spare litigants themselves the expense and inconvenience of a trial procedure." *U. S. v. Mississippi, supra,* P. 942.

We submit that the motion of the Board of Registration to dismiss for failure to state any claim upon which relief could be granted against them should be sustained. The parish registrar alone is charged with the enforcement of the statutes under attack here. They are not parties to this action. We believe that this would obviate the portion of the judgment rendered herein as to the registrars themselves under Rule 19(b) of the Federal Rules of Civil Procedure.

In *United States v. Mississippi* after thoroughly reviewing the right of the United States to maintain the action brought under 42 U.S.C.A. § 1971 (d) the Court comes to the conclusion that:

> "The first sentence of subsection (c) of §1971 is the one which grants the Attorney General the power to institute certain proceedings under certain circumstances: 'Whenever any *person* has engaged or there are reasonable grounds to believe that any *person* is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section.' The plain meaning of that part of subsection (c) is that Congress vested the Attorney General with power to seek injunctive relief against state election

officials acting under color of law when said officials should deny a person 'otherwise qualified to vote' of the right to vote because of race or color."

"Assuming, therefore, that § 1971 does empower the United States, through the Attorney General, to assist legally a person who meets all of the other qualifications of Mississippi law, who is being discriminated against because of his color, the statute does not tend to support the action here, which is not based upon discrimination, but upon the asserted fundamental unconstitutionality of the entire structure of Mississippi law providing voter qualifications. Under these circumstances the least this Court can do is to avoid a doubtful constitutional construction and to dismiss the action because it is not brought under any power given by the statute relied on, but is a direct attack by the Indestructible Nation as such, and is against the Indestructible State as such. And, moreover, it is an attack against a state aimed at destroying its action in a field committed exclusively to it by the Constitution; to-wit, the state's power to determine and define the qualifications of the electors who may vote not only in state elections, but in federal elections as well."

III.

The constitutional interpretation test used by Louisiana is not "per se" invalid. The Supreme Court in *Minor v. Happersett* 21 Wall 162, 88 U.S. 162, 22 L.Ed. 627, thoroughly considered the fundamental question whether the right to vote was one of the

privileges and immunities of citizenship. It is interesting to follow the simple logic of this decision. It explained that there cannot be a nation without a people and this necessarily implies an association of persons for the promotion of the general welfare. Thus it became necessary to find a name for this membership in the association. Subject—Inhabitant—Citizen. Citizen has been the word commonly used and accepted.

> "When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more." Page 628 supra.

It goes on to explain that sex has never been made one of the elements of citizenship in the United States. When, then, Mrs. Minor argued that the Fourteenth Amendment extended to her the right of suffrage the Court declined this contention and turned to the direct question "whether all citizens are necessarily voters".

When the Constitution was adopted all States except Rhode Island had Constitutions of their own and in no State were all citizens permitted to vote.

> "The right of suffrage, when granted, will be protected. He who has it can only be deprived of it by due process of law, *but in order to claim protection he must first show that he has the right.*" Page 631.

> "Certainly, if the Courts can consider any question settled, this one is. For nearly 90 years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If

uniform practice, long continued, can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be."

The Court then concludes:

"If the law is wrong, it ought to be changed; but the power for that is not with us." Page 631.

Then, in *United States v. Reese*, 92 U.S. 214, 23 L.Ed. 563, 564 in disposing of the argument that the right to vote was conferred by the Fifteenth Amendment to the United States Constitution the Supreme Court said:

"The Fifteenth Amendment does not confer the right of suffrage on anyone."

Disability to vote, of every kind, arising from race, color or previous condition of servitude is removed by the Fifteenth Amendment from the colored male citizen; (females having been subsequently eliminated by the Nineteenth Amendment), but unless otherwise qualified by law to vote at such an election, he is no more entitled to enjoy that privilege than a white male citizen who does not possess the qualifications required by law to constitute him a legal voter at such an election.

In *McPherson v. Blacker* 146 U.S. 1, 13 S. Ct. 3, 36 L.Ed. 869, the United States Supreme Court again recognized the fact that it was within the province of the State and not the Federal Government to determine voter qualifications. It said:

> "The 15th Amendment exempted citizens of the United States from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. The right to vote in the states comes from the states, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been. *United States v. Cruikshank*, 92 U.S. 542; *United States v. Reese*, 92 U.S. 214.

And further quoting the Court went on to say:

> "The right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the State."
>
> * * * *
>
> "The object of the 14th Amendment in respect of citizenship was to preserve equality of rights and to prevent discrimination as between citizens, but not to radically change the whole theory of the relations of the state and Federal governments to each other, and of both governments to the people. *Re Kemmler*, 136 U.S. 436."

In a long line of unbroken jurisprudence, the United States Supreme Court has consistently recognized that the privilege of voting is conferred upon the citizens by the States and that the United States Constitution does not confer upon anyone the privilege of suffrage.

> "Before the 14th Amendment the whole subject of the elective franchise was within the exclusive control of the several states, and the right or privilege of voting was (as it still is)

a right or privilege arising under the Constitution of each state, and not under the Constitution of the United States.

"*Anderson v. Baker*, 23 Md. 623; Cooley, Const. L. 277; *Kinneen v. Wells*, 144 Mass. 497, 59 Am. Rep. 105, 11 N.E. 916; *Stone v. Smith*, 159 Mass. 413, 34 N.E. 521; *Gougar v. Timberlake*, 148 Ind. 38, 37 L. R. A. 644, 62 Am. St. Rep. 487, 46 N. E. 339; 16 Albany L. J. 272; *United States v. Anthony*, 11 Blatchf. 202, Fed. Cas. No. 14,459; *Van Valkenburg v. Brown*, 43 Cal. 43, 13 Am. Rep. 136.

"Since the adoption of the 15th Amendment the whole control over suffrage and the power to regulate its exercise is still left with and retained by several states, with the single restriction that they must not deny or abridge it on account of race, color, or previous condition of servitude.

"*United States v. Harris*, 106 U. S. 636, 644, 27 L.Ed. 292, 1 Sup. Ct. Rep. 601; *James v. Bowman*, 190 U.S. 127, 47 L.Ed, 979, 23 S. Ct. Rep. 678; *Minor v. Happersett*, 21 Wall. 178, 22 L.Ed. 631; *United States v. Reese*, 92 U.S. 214, 217, 218, 23 L.Ed. 563-565; *United States v. Cruikshank*, 92 U.S. 542, 555, 556, 23 L.Ed. 588, 592.

"The states may prescribe any qualification of age, residence, property or education which they shall see fit to prescribe, provided only that their Constitution and laws regulating the subject shall apply equally, uniformly, and impartially to white and colored, native and naturalized alike.

"*Williams v. Mississippi*, 170 U.S. 213, 42

L.Ed. 1012, 18 Sup. Ct. Rep. 583; *Gibson v. Mississippi*, 162 U.S. 582, 40 L.Ed. 1079, 16 Sup. Ct. Rep. 904; *Giles v. Harris*, 189 U.S. 475, 47 L.Ed. 909, 23 Sup. Ct. Rep. 639; *James v. Bowman*, 190 U.S. 127, 47 L.Ed. 978, 23 Sup. Ct. Rep. 678."

In *Pope v. Williams* 193 U.S. 621, 632, 24 S.Ct. 573, 575, 48 L.Ed. 817 the Court said:

> "The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. * * * It may not be refused on account of race, color or previous condition of servitude, but it does not follow from mere citizenship of the United States."

Thus, we disagree with the conclusion reached by the Court below that the right to vote is guaranteed by the United States Constitution and respectfully submit that this is erroneous.

Since the privilege of voting eminates from the States and the judicial function is properly exercised and limited only by indicating whether or not the State has transcended provisions of the Federal Constitution, the Federal Court must not and cannot direct the State in the procedures to be used in registering voters. See *Lassiter v. Northampton County Board of Elections* (1959) 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed. 1072, wherein the Court stated:

> "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised." 79 S.Ct. 989.

This case goes on in the most appropriate language to say:

> "Article I, §2 of the Constitution in its provision for the election of members of the House of Representatives and the Seventeenth Amendment in its provision for the election of Senators provide that officials will be chosen 'by the People.' Each provision goes on to state that 'the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.' So while the right of suffrage is established and guaranteed by the Constitution (*Ex Parte Yarbrough*, 110 U.S. 651, 663-665, 4 S.Ct. 152, 158, 159, 28 L.Ed. 274; *Smith v. Allwright*, 321 U.S. 649, 661-662, 64 S.Ct. 757, 763-764, 88 L.Ed. 987) it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress acting pursuant to its constitutional powers, has imposed. See *United States v. Classic*, 313 U.S. 299, 315, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368. While § 2 of the Fourteenth Amendment, which provides for apportionment of Representatives among the States according to their respective numbers counting the whole number of persons in each State (except Indians not taxed), speaks of 'the right to vote,' the right protected, 'refers to the right to vote as established by the laws and constitution of the state.' *McPherson v. Blacker*, 146 U.S. 1, 39, 13 S.Ct. 3, 12, 36 L.Ed. 869."

Volume 49, No. 10, 1963 of the American Bar Association Journal contains an article on "Free Elections and the Power of Congress over Voter Qualifi-

cations". The author is Dr. Wilfred J. Ritz, Professor of law, Washington and Lee University. This paper is comprehensively examined and analyzed by Judge Cameron in *United States v. Mississippi supra* and we quote and adopt this analysis as our own.

> "Article I, Section 2 of the Constitution provides that representatives shall be 'chosen every second Year by the People'. It further provides that 'the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature'. These simple words contain the only requisite provided for the selection of those persons who shall vote in federal elections.[39]
>
> "As pointed out by Dr. Ritz, the very simplicity of this language of the Constitution might tend to suggest casualness of draftsmanship. He promptly points out, however, that such was not the case, suggesting that the records of the convention, as discussed in Farrand, show that it was deeply concerned with problems relating to the election of officials of the Federal Government, adopting a plan for the indirect election of the President and Vice President by use of an

[39]Volume 49, No. 10, 1963, of the American Bar Association Journal contains an excellent article on "Free Elections and the Power of Congress Over Voter Qualifications." Therein is reproduced the paper by Dr. Wilfred J. Ritz, Professor of Law, Washington and Lee University, which won first place in the 1962 Samuel Pool Weaver Constitutional Law Essay Competition conducted annually by the American Bar Foundation. We draw extensively from this paper in this portion of the opinion. Dr. Ritz cited many times from Farrand, "The Records of the Federal Convention of 1787," 4 Vols. (Rev. ed. 1937). While the article deals alone with the power of Congress, most of its contents apply equally to the Courts.

electoral college. The convention provided: 'Each state shall appoint in such manner as the legislature thereof may direct, a number of electors * * *', thereby leaving the method of selection and qualifications to the states, although Congress was authorized to establish the time of their choosing. *

"On May 29, 1787, in presenting the resolutions known as The Virginia Plan, which provided the basic framework of the Constitution, Edmund Randolph proposed a national legislature to consist of two branches, the members of the first to be elected by the people of the several states, and the members of the second to be elected by the first branch from persons nominated by the state legislatures. The national executive was to be elected by the national legislature.[40]

"On May 31, sitting as a committee of the whole House, the convention approved the resolution calling for a national legislature to consist of two branches, and then considered and debated the resolution calling for election of the first branch by the people, adopting it by a vote of six states to two, with two states divided.[41] A few days later the convention reconsidered and again upheld popular election, this time by a vote of eight states to three.[42]

"During consideration of The New Jersey Plan, still another attack on popular election was narrowly defeated, then another motion to re-

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[40] 1 Farrand 20-21, 27-28.
[41] 1 Farrand, 46, 47-50, 54-55, 56, 60.
[42] 1 Farrand 118, 124, 130, 132-138, 140-141, 142-144, 145, 147.

consider was voted down by six states to four, with one divided.[43]

"As Dr. Ritz points out, on page 950 of the A.B.A. Journal for October, 1963, various aspects of the provision were debated with care until, finally, the provision was passed without any state dissenting. The debate on the qualification of voters was thus ended. On August 9th, the convention granted to Congress the power to supersede state regulations *as to the time, place and manner of holding elections.* The debate shows that it was pointed out that the provision *had nothing to do with voter qualifications.*[44]

"On September 8th, the convention named a committee of style, which made only one change which was adopted by the convention denying Congress any power over the place of election of senators. The provisions relating to elections were adopted and became a part of the completed Constitution.[45]

"The article further points out that the Seventeenth Amendment ratified in 1913, providing for the popular election of senators, follows the pattern set forth in the original Constitution by providing that the electors in each state shall 'have the qualifications requisite for electors of the most numerous branch of the state legislatures'.[46]

"It further states that, except for the Fif-

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[43]1 Farrand, 353, 358-360, 364-365, 367, 368.
[44]2 Farrand 651, 653.
[45]2 Farrand 229, 239-242, 244.
[46]Vol. 49, No. 10, A.B.A.J. page 951.

teenth and Nineteenth Amendments, which place restrictions on the qualifications the states may require of electors for state officials and so, indirectly, become limitations on the qualifications as defined in the original Constitution, 'Otherwise, there are no constitutional restrictions on the qualifications the states may require of electors for state officials, and so also of electors of federal officials.'[47] The article refers also to the 'Poll Tax Amendment,' emphasizing that it departed from the pattern of previous amendments in that a state is permitted to establish a different qualification for electors to the most numerous branch of its own state legislature than the state can establish for the election of federal officials. But the elimination of that qualification could be done by constitutional amendment alone.

"It is clear, therefore, that in the ratification of the Seventeenth Amendment and of the Poll Tax Amendment, the Congress of the nation and the people have affirmed in this century that the power to establish or change the qualifications of electors for federal officials can be accomplished by constitutional amendment alone.

"Dr. Ritz's estimate of the constitutional scheme for establishing the qualifications of electors for federal officials is thus stated at the conclusion of his article:[48]

> '* * * For this reason, the Constitution establishes the qualifications of electors for federal officials by a readily ascertainable and completely objective standard. This ob-

[47] Id.

[48] 49 A.B.A.J., No. 10, page 954.

> jective standard is beyond the power of the Federal Government to change, except by going to the states and the people to seek a change through the process of constitutional amendment. History demonstrates that when a change has been needed, the necessary constitutional amendments have been forthcoming. * * * '

"The decisions of the Supreme Court teach a similar lesson. *Slaughter-House Cases*, 16 Wall. 36, 83 U.S. 36, 21 L.Ed. 394; *Minor v. Happersett*, 21 Wall. 162, 88 U.S. 162, 22 L.Ed. 627; *United States v. Reese, supra; United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588; *Ex parte Yarbrough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274; *Swafford v. Templeton*, 185 U.S. 487, 22 S.Ct. 783, 46 L.Ed. 1005; *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340; *Newberry v. United States*, 256 U.S. 232, 41 S.Ct. 469, 65 L.Ed. 913; *Breedlove v. Suttles*, 302 U.S. 277, 58 S.Ct. 205, 82 L.Ed. 252; *Lassiter v. Northampton Board of Elections, infra.*"

In addition to these considerations we wish to quote directly from said paper by Dr. Ritz as follows:

> "The principal judicial support for a view that Congress has some power over voter qualifications is found in a dictum by Chief Justice Stone (then an associate justice) in *United States v. Classic*, wherein he said:
>
> > ' . . . While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states . . . this statement is true only in the sense that the states are authorized by

> the Constitution to legislate on the subject as provided by Section 2 of Article I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under Section 4 and its more general power under Article I, Section 8, clause 18 . . .'

The implication that the powers of Congress under Section 4 of Article I may be used to restrict the powers of the states under Section 2 of the same article is entirely without support in the history of the federal convention of 1787 or in the prior decisions of the Court. If the reference had been to the power of the states to legislate under *Section 1*, instead of Section 2, the statement would have been in complete accord with the language and history of the Constitution and the judicial precedents. Consequently, there is a strong probability that the reference to Section 2 was a slip rather than a considered citation."

IV.

The Court should not have enjoined the use of the Citizenship Test.

By resolution of August 3, 1962 in compliance with Act 62 of 1962, the State Board of Registration adopted a voter qualification test. It was and is a uniform, objective, standardized test or examination administered to all prospective electors alike. See *Davis v. Schnell, supra.* An applicant is required to indiscriminately draw one of ten cards. Each card has six multiple choice questions, four of which the applicant must answer correctly. Although the

lower Court states "This test is considerably more difficult than the 'tests' administered to white applicants in the past, in that it requires a comprehension of the theory of the American system of government and a knowledge of specific constitutional provisions," *U. S. v. Louisiana, supra,* page 392, the fact is that this test is much easier than the old system complained of.

An example of a question which appears on each card is:

"The name of our First President was—

a. John Adams
b. George Washington
c. Alexander Hamilton

Another example is:

"The Supreme Court is made up of—

a. 9 Justices
b. 6 Justices
c. 5 Justices

Applicant for registration is required to circle the a, b or c to indicate the proper answer and only four of the six need to be answered correctly.

The whole tenor of this test or examination is followed as in the course of study prepared and disseminated by the Department of Justice through its Immigration and Naturalization Service to those aliens interested in becoming citizens of this Nation. Should not a citizen of this Nation have at least the same basic knowledge of our Constitution and govern-

mental procedures as is required of aliens who apply for citizenship.

We have previously shown that a State statutory requirement, applicable to all races, that a voter be able to read and write, is a fair way to determine literacy, and such requirement was not subject to the Court's supervision. *Guinn v. U. S., supra; Lassiter v. Northampton, supra.* We have also shown that this authority extends to other areas.[5] And yet the lower Court philosophizes as follows:

> "Considering Louisiana's unhappy position as the State with the highest rate of illiteracy and the lowest percentage of citizens with a high school education, the citizenship test can be regarded as a step forward only by those in favor of a severely limited representative government of guardians by a small, elite assembly . . ." Page 392.

Judge Wisdom then says:

> "We reserve judgment therefore on the constitutionality of the new examination."

Thus, the "citizenship test" is presumed to be valid and constitutional until such time as it is found to be unconstitutional. Where then, is its authority to enjoin its use. There has been no allegation or proof that this "citizenship test" has been improperly or discriminately applied, nor does the Court so find. It simply considers the "effect of this new action on

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[5] *Breedlove v. Suttles*, 302 U.S. 277 (1937). See also *Pirtle v. Brown*, 118 F. 2d 218 (6th Cir. 1941) Cert. denied, 314 U.S. 621 (1941); *Butler v. Thompson*, 341 U.S. 937 (1951), aff'g 97 F. Supp. 17 (E.D. Va. 1951).

those who have been discriminated against in the past."

We urge that the State has the right to make such changes. The Legislature may change and modify pre-existing rules of evidence relating to the qualifications of voters. Cooley, Const. L. 7th Ed. 524, 1903; 11 Am. & Eng. Euc Law, 2nd ed title Evidence p. 550; 6 Am & Eng. Euc. Law Md ed title Constitutional Law p. 950.

Citizenship and suffrage are by no means inseparable; the latter is not one of the fundamental, inalienable rights with which men are endowed by their Creator, but is altogether conventional. Suffrage is not a right of property or absolute personal right.

Anderson v. Baker, 23 Md 531; Cooley Consti L. 276, 277; Black, Const. Law 466; Story, Const. § 581.

The Court further states that

> "Courts retain an undiminished authority to grant suitable equitable relief that will rectify past inequities now, without delay, and will prevent future inequities."

It cites *State of Ala. v. U. S.*, 5 Cir. 1962, 304 Fed. Md 583, aff'd 371 U.S. 37, 83 S.Ct. 145, 9 L.Ed. Md 112.

The majority opinion in Alabama does not stand for the proposition for which it is cited. As a matter of fact, the majority opinion opens with a clear, concise statement of the limited nature of the question to be decided, viz: whether the District Court may affirmatively order the registration of specified and named

Negro voters found by the Court to have been discriminatorily denied registration because of their race or color. Then after reviewing the facts and concluding that the District Court was eminently correct in that the facts clearly showed a flagrant pattern of discriminatory practice which was then and had long been in existence in the State of Alabama. In evaluating this fact situation, the Court said:

> ". . . but what was undoubtedly the most disturbing thing of all to the trial Judge, was not the recitation of past events, which showed that as time went on, things were getting progressively worse, not better: *the disturbing thing was rather, that there was not even a slight ray of hope that conditions would improve . . .*" (Emphasis supplied)

It was in this setting—under the cumulative impact of gross abuses in the past and little expectation of improvement for the future—that the Judge was led to conclude "That this Court is of the firm opinion that this case warrants not only a prohibitory decree but a decree mandatory in nature." D.C., 192 F. Supp. 677 at 682. In the light of the Civil Rights Acts of 1957, as amended in 1960, the Court went on, "complete relief requires that the decree in this case be framed so as (1) to correct the effect of the Board's Negroes on the voting rolls immediately . . .," D.C. 192 F. Supp. 677, 682. Implementing this, the District Court's opinion called for the mandatory decree now under attack:

> "In this connection, this Court specifically finds and concludes that the Negro citizens of

> Macon County whose names are listed on Appendix 'E' to this opinion were qualified by law to vote at the time of their respective applications for registration and the failure to register these Negro citizens was and is in violation of the Constitution and laws of the United States." D.C., 192 F. Supp. 677, 682-683.

In the light of the circumstances of this Record, briefly summarized by us, we are of the clear view that this order was within the power of the Court to grant, and that the exercise of that power was eminently proper.

This is not the same situation as here. In our case the State has changed a portion of its qualification standards which it has the right to do. The decree of the Court below can have no other effect than the taking over by the Court of the functions of the State when it comes to determining the qualifications required for voter privileges. It is not necessary that the Federal Court interfere with established valid State and local procedures.

The class for whom the United States acts in this cause has an adequate remedy at law. Louisiana law provides for and encourages the removal from the registration rolls of *all* persons illegally or fraudulently registered. LSA:R.S. 18:245.[6]

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[6]Illegal registration or loss of right to vote; notice to registrant; cancellation of name on failure to prove right.

Upon a written affidavit signed and sworn to in duplicate before and filed with the registrar or his deputy by any two bona fide registered voters of the parish, to the effect that after reasonable investigation and on information and belief certain persons are illegally registered, or have lost their

The Supreme Court stated in *McCabe v. Atchinson, T & S.F.R. Co.* (1914) 235 U.S. 151, 162, 35 S.Ct. 69, 71, 59 L.Ed. 169:

> "It is an elementary principle that, in order to justify the granting of this extraordinary relief, the complainant's need of it, and the absence of an adequate remedy at law, must clearly appear."

The issuance of the injunction against the twenty-one parishes which had used the oral interpretation test actually has the effect of disregarding the valid authority of a State to act in this field. It directs that a nondiscriminatory re-registration of all voters would be the only fair and effective means of clearing away the effect of the interpretation test. With this we must disagree. The Atkins case specifically rejects the proposition that a State may not alter its voting requirements without re-registering all voters in the State.

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right to vote in the precinct, ward, or parish in which they are registered by reason of removal or otherwise, the registrar shall immediately, or, in any event, within forty-eight hours, notify the registrants by mailing to them postage prepaid, under P. O. Form 3547—Requested, at the addresses given in the registration records, the duplicate copy of affidavit, together with a printed citation requiring them to appear in person before the registrar or his deputy within ten days from the date of the mailing of the duplicate affidavit and citation, which date shall be stated in the citation, and prove their right to remain on the registration rolls by written affidavit of three bona fide registered voters in the form as provided in R. S. 18:132. The registrar shall immediately make a similar publication, as provided for in R.S. 18:132, and if the challenged registrants fail; within the same delays provided in that Section, to prove their right to remain on the rolls, as in that Section provided, the registrar shall cancel their names from the registration records as provided by R.S. 18:135.

The present position of the Court below is to recognize as unlawful administration by State officials of a State statute fair on its face and then further to penalize the State by prohibiting the use of a new statute, not only fair on its face, but fairly and indiscriminately applied.

> "The citizenship test now required by the new Louisiana statute is a much more reasonable test than the former constitutional interpretation test which the Negro citizens failed." See *United States v. Fox* 211 F. Supp. 25.

The perpetuity of the inequities referred to by the Court are, therefore, not to be cured by the sweep of the broom in ordering the violation and disregard of valid State law.

In Atkins it was stated:

> "The freezing effect which appellant complains of results from several factors. On the one hand there are those whites whose registration did not comply with even the minimal requirements of State law. We believe that there is a less radical remedy for this injustice than the one suggested by the appellant. Rather than making such unlawful practices a permanent fixture in Dallas County, the district court could, on petition by appellant, purge from the registration list those persons proved by the appellant to have been registered by a procedure which does not meet the minimal requirements of State law. These persons could then reapply for registration subject to the same requirements as everyone else. Such relief would be within the broad equity powers recognized in *Alabama v. United States*,

5 Cir., 304 F. 2d 583, aff'd per curiam, 371 U.S. 37, 83 S.Ct. 145, 9 L.Ed. 2d 112 (1962)."

In effect this decree recognizes and establishes the "freezing theory" so aptly described and defined in Atkins, but with respect to this theory as it applies here Atkins said:

> "As long as there is the ability to reapply, it is unlikely that within this zone there would be any freezing effect so great as to amount to an injustice." Page 745.

This case further states:

> "Where the application of this principle would mean that the Board must in the future continue to violate state law as did its predecessors, the principle should be used, assuming such use could ever be justified, *only if there were no other alternatives by which justice could be reached.*" (Ibid)

There is no limitation in the Louisiana law to prohibit a person from reapplying for registration should they not be accepted.

The effect of the decree is to establish universal suffrage through judicial action when in fact there is no constitutional or legislative authority for this proposition.

The appellant or the aggrieved individuals have the right to ask a court of competent jurisdiction to inquire into the qualifications of those persons whom it contends are illegally and fraudulently registered to vote. It has no right to ask this Court to disregard

State law, presumed to be constitutional until such time as it is found to be unconstitutional and thus order the defendant Registrar to violate his oath and his responsibility and to give special privileges to a special group or class when he has already been prohibited from doing so by the District Court.

To borrow from the dissenting opinion in *U. S. v. Louisiana*, we sum up in agreement with the following:

> "This sad epoch in our history (post Civil War) was fomented in no small part, by well intentioned men in too much of a hurry."

We fondly hope that in the name of right and reason we shall not be guilty of creating additional problems to foment discord, discontent and disregard of the existing law.

CONCLUSION

It is respectfully submitted that the judgment of the Court below should be reversed and this suit dismissed.

In the alternative, and only in the event this Court upholds the jurisdiction as to the defendants, then the judgment of the lower Court should be reversed and Article 8, Section 1(c) of the Constitution of Louisiana and its implementing statute be held to be constitutional and valid.

In the alternative, the injunction issued against the twenty-one named parishes of the State of Louisi-

and against the use of the "Citizenship Test" should be recalled and set aside.

Respectfully submitted,

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CERTIFICATE

I, Jack P. F. Gremillion, a member of the Bar of the United States Supreme Court, hereby certify that this ____ day of _____, 1964, a copy of the above and foregoing brief was served on Honorable Burke Marshall, Assistant Attorney General, Department of Justice, Washington, D. C., by depositing same in the United States Mail, postage prepaid.

_____

HARRY J. KRON, JR.